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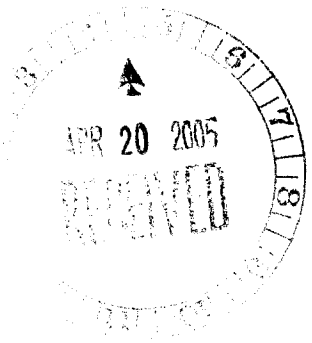
April 20, 2005



BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, D.C. 20423-0001

Re: Ex Parte No. 657, Rail Rate Challenges
Under the Stand-Alone Cost Methodology

Dear Secretary Williams:

Enclosed for filing in the referenced docket please find an original and ten copies of the Comments of the Concerned Captive Coal Shippers. The Comments include (as Exhibit Nos. 1 and 2) the Written Testimony of S.M. DeBord, Vice President, Transportation & Combustion Services, American Electric Power Services Corporation, and Jason Frisbie, Division Manager, Power Production, for Platte River Power Authority. We have enclosed copies of these Comments in electronic form on three computer diskettes.

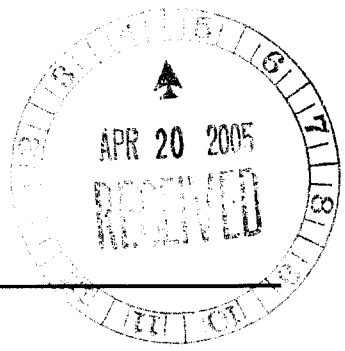
Finally, we have enclosed an additional copy of these Comments to be date-stamped and returned to the bearer of this letter. Thank you for your attention to this matter.

Sincerely,

C. Michael Loftus

C. Michael Loftus
An Attorney for the Concerned Captive
Coal Shippers

Enclosures



BEFORE THE
SURFACE TRANSPORTATION BOARD

RAIL RATE CHALLENGES UNDER THE STAND-ALONE COST METHODOLOGY	)))))	Ex Parte No. 657

COMMENTS OF THE CONCERNED CAPTIVE COAL SHIPPERS

CONCERNED CAPTIVE
COAL SHIPPERS

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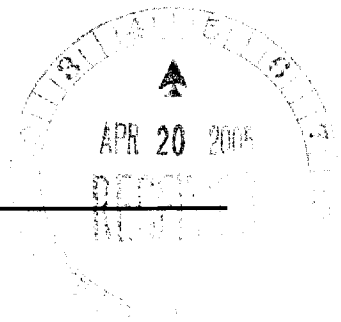
Dated: April 20, 2005

BEFORE THE
SURFACE TRANSPORTATION BOARD



RAIL RATE CHALLENGES UNDER THE STAND-ALONE COST METHODOLOGY	)	Ex Parte No. 657

COMMENTS OF CONCERNED CAPTIVE COAL SHIPPERS

On February 16, 2005, the Board invited interested parties to submit comments on the subject of rail rate challenges under the stand-alone cost ("SAC") methodology. The Concerned Captive Coal Shippers ("Concerned Coal Shippers") hereby submit their Comments in response to that invitation. In addition, the Concerned Coal Shippers are submitting (as Exhibit Nos. 1 and 2 hereto) the written testimony of S.M. DeBord, Vice President, Transportation & Combustion Services, American Electric Power Services Corporation, and Jason Frisbie, Division Manager, Power Production, for Platte River Power Authority.

IDENTITY AND INTEREST

The Concerned Coal Shippers include the following twelve entities: American Electric Power Service Corporation, City of Grand Island, Nebraska, City Utilities of Springfield, Missouri, Duke Energy Corporation, Intermountain Power

Project, Lafayette Utilities System, Platte River Power Authority, Progress Energy, Inc., Reliant Energy, Inc., Seminole Electric Cooperative, Inc., South Carolina Public Service Authority (Santee Cooper), and South Mississippi Electric Power Association. Each entity consumes coal to generate electricity, relies upon rail carriers to transport that coal, and has one or more generating stations captive to a single railroad. Each, by virtue of its circumstances, has a strong interest in the subject matter of this proceeding.

(1) American Electric Power Service Corporation. AEP Service Corporation acts as agent for its American Electric Power ("AEP") electric generating affiliates in securing coal transportation services for more than 35 million tons of coal annually, at a cost of more than $350 million. AEP, with more than 5 million American customers, is one of the country's largest investor-owned utilities, serving parts of 11 states. The service territory covers 197,500 square miles in Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia and West Virginia.

AEP owns and operates about 80 generating stations in the United States, with a capacity of more than 36,000 megawatts. Coal-fired plants account for 73 percent of AEP's generating capacity.

One AEP electric generating company, AEP Texas North Company, is the complainant in Docket No. 41191 (Sub-No. 1), which is currently pending before the Board. Therein, AEP Texas North is challenging BNSF Railway Company's rates for service to the Oklaunion Station in Vernon, Texas.

(2) City of Grand Island, Nebraska. Grand Island, Nebraska is the third-largest stand-alone city in the State of Nebraska, and includes a population of more than 43,000. Grand Island owns and operates the 100 MW Platte Generating Station, which consumes approximately 400,000 tons of coal per year.

Union Pacific ("UP") is the only rail carrier that serves the Platte Station. Since the termination of the parties' rail transportation contract as of the end of 2004, UP has provided service to Grand Island pursuant to its Circular 111 public pricing arrangements.

(3) City Utilities of Springfield, Missouri ("CUS"). City Utilities of Springfield is a community-owned utility serving Springfield, Missouri and the surrounding area with electricity, natural gas, water, telecommunications and transit services. CUS owns and operates two coal-fired power plants, including the 195 MW Southwest Power Station and the 255 MW James River Station.

Rail service to Southwest and James River is provided solely by BNSF. Each year, CUS consumes approximately 800,000 tons of coal at the Southwest Station and 1,000,000 tons of coal at James River.

(4) Duke Energy Corporation. Duke Energy is a diversified energy company with a portfolio of natural gas and electric businesses, both regulated and non-regulated, and an affiliated real estate company. Duke Energy supplies, delivers and processes energy for customers in North America and selected international markets.

IPP's generation rights are held, respectively, by the Los Angeles Department of Water and Power (44.6%), five California cities (30%), twenty-three municipal Utah purchasers (14%), six cooperative Utah purchasers (7%), and one investor-owned Utah purchaser (4%).

Rail service to IPP's generating station is provided solely by the Union Pacific Railroad Company.

(6) Lafayette Utilities System ("LUS"). LUS is a publicly-owned and operated utility serving the electric, water, wastewater, and telecommunications needs of more than 55,000 retail customers in Lafayette, Louisiana. LUS is a 50% owner of the 523 MW, coal-fired Rodemacher Generating Station in Boyce, Louisiana.

The Rodemacher co-owners collectively purchase approximately 2 million tons of coal annually for use at Rodemacher. All of this coal originates from the mines in Wyoming Powder River Basin. The only practical way to transport this coal from Wyoming to Rodemacher (a distance of over 1,500 miles) is by rail and the only carrier capable of serving the Rodemacher Station is Union Pacific.

(7) Platte River Power Authority. Platte River Power Authority is a political subdivision and public corporation of the State of Colorado which supplies the electricity used by the communities of Estes Park, Fort Collins, Longmont, and Loveland, Colorado. Its headquarters is located in Fort Collins, and it has facilities located primarily along the Front Range and the western slope of northern Colorado, in addition to a wind

project at Medicine Bow, Wyoming. Platte River also provides surplus electricity and support services to other utilities in the western United States.

Platte River owns and operates the Rawhide Energy Station, a 270 MW coal-fired power plant, located north of Fort Collins, along with nearly 270 miles of transmission lines in northern Colorado. Platte River also has an 18% (154 MW) interest in the Yampa Project, consisting of Craig Station Units 1 and 2, a coal-fired plant located near the town of Craig, approximately 130 miles west of Fort Collins on the western slope of Colorado.[1]

The total annual coal consumption at Rawhide is approximately 1.4 million tons. BNSF provides the only rail service option for coal moving to the Rawhide Station, and currently provides such service pursuant to a rail transportation contract.

(8) Progress Energy, Inc. Progress Energy, headquartered in Raleigh, N.C., is a Fortune 250 diversified energy company with more than 24,000 megawatts of generation capacity and $9 billion in annual revenues. The company's holdings include two electric utilities serving approximately 2.9 million customers in North Carolina, South Carolina and Florida. Progress Energy also includes nonregulated operations

[1] Craig Units 1 and 2 are jointly owned by Platte River, Tri-State Generation & Transmission, Inc., Xcel Energy, the Salt River Project and PacifiCorp. Tri-State is the project operating agent. The plant is adjacent to the Trapper Mine, which is the primary coal supplier for the plant and is jointly-owned by the participants.

covering competitive generation, energy marketing, natural gas production, fuel extraction and broadband capacity.

Progress Energy's coal-fired plants include: (i) the two-unit, 392-MW Asheville Steam Plant at Skyland, N.C.; (ii) the two-unit, 316 MW Cape Fear Plant near Moncure, N.C.; (iii) the four-unit Crystal River steam complex, located near Crystal River, Fla., which includes two units built in the 1960s (Crystal River South, totaling 865 MW) and two units built in the 1980s (Crystal River North, totaling 1,437 MW); (iv) the three-unit, 407 MW H.F. Lee Plant near Goldsboro, N.C.; (v) the single-unit, 745 MW Mayo Plant near Roxboro, N.C.; (vi) the single-unit, 174 MW H.B. Robinson Steam Plant near Hartsville, S.C.; (vii) the four-unit, 2,462 MW Roxboro Steam Plant near Roxboro, N.C.; (viii) the three-unit, 613 MW L.V. Sutton Steam Plant near Wilmington, N.C.; and (ix) the three-unit, 176 MW W.H. Weatherspoon Steam Plant near Lumberton, N.C. All of Progress Energy's coal-fired plants are served by rail. Three are served solely by NS, four solely by CSXT, and two jointly by NS and CSXT.

(9) Reliant Energy, Inc. Reliant Energy, Inc., which is based in Houston, Texas, provides electricity and energy services to retail and wholesale customers in the United States. The company provides a complete suite of energy products and services to approximately 1.9 million electricity customers, ranging from residences and small businesses to large commercial, industrial and institutional

customers, primarily in Texas. Reliant also serves commercial and industrial clients in the PJM (Pennsylvania, New Jersey, Maryland) Interconnection.

The company is one of the largest independent power producers in the nation. As of December 31, 2004, Reliant owned, had an interest in or leased 50 operating electric power generation facilities with an aggregate net generating capacity of 18,737 MW in six regions of the United States. These generating assets utilize natural gas, wind, fuel oil and coal.

Each year, Reliant's generating facilities ship more than 3.2 million tons of coal by rail. Of Reliant's nine coal-fired generating stations, four are served only by a single railroad.

(10) Seminole Electric Cooperative, Inc. Seminole is a rural electric generation and transmission cooperative ("G&T") headquartered in Tampa, Florida. An estimated 1.6 million individuals and businesses (as of year end 2004) rely on Seminole's 10 member distribution systems for their electric power. Seminole's members serve more than 800,000 meters in portions of 46 of Florida's 63 counties.

The primary energy resource serving Seminole's member systems is the Seminole Generating Station. This 1,300 megawatt, coal-fueled power station is located in Northeast Florida in Putnam County, on the St. Johns River, south of Jacksonville. It consumes approximately four million tons of coal and/or petroleum coke per year. The

Seminole Station is served exclusively by CSXT. CSXT currently provides service to Seminole pursuant to a rail transportation contract.

(11) South Carolina Public Service Authority (Santee Cooper). Santee Cooper serves over 143,000 retail customers in Berkeley, Georgetown, and Horry Counties, South Carolina, and supplies power to the municipalities of Bamberg and Georgetown, 32 large industries, and one military installation in North Charleston. The state-owned electric and water utility generates the power distributed by the state's 20 electric cooperatives. Santee Cooper power now flows in all 46 counties in the state serving over 625,000 customers.

Santee Cooper owns and operates four large-scale, coal-fired generating stations in South Carolina: Jefferies Station in Moncks Corner, Cross Station in Cross, Winyah Station in Georgetown, and Grainger Station in Conway. All of these plants are served exclusively by CSXT. Collectively, these four stations consume approximately 8 million tons of coal per year with a capacity of approximately 2,791 MW. Santee Cooper is constructing two additional units at the cross station which will increase Santee Cooper's coal consumption to approximately 11 million tons per year and its capacity to approximately 3,951 MW. Rail service to these plants is currently provided by CSXT pursuant to rail transportation contract.

(12) South Mississippi Electric Power Association ("SMEPA"). SMEPA is a rural electric power association formed for the purposes of generating and

transmitting electric energy. SMEPA is headquartered in Hattiesburg, Mississippi, and provides wholesale electric energy to eleven member-owners. The member-owners, in turn, are each rural electric distribution cooperatives who sell power to homes, farms, and businesses in Mississippi. SMEPA recovers its cost of providing electric energy through wholesale rates to its eleven members. Fuel costs, including the costs to transport fuel, are eventually passed on to the electric customers by the local cooperatives.

SMEPA owns and operates an electric generating facility at Richburg, Mississippi known as the Morrow Station. This 400 MW facility consists of two coal-burning electric generating units. The Morrow Station consumes approximately one million (1,000,000) tons of coal per year, and operates on a nearly continuous basis. Rail transportation is the only economical means of delivering large volumes of coal to the Morrow Station, and rail access to the Morrow Station is exclusively over the lines of NS. As such, SMEPA is captive to NS, and SMEPA has no other current transportation option for delivering its coal purchases. NS currently provides transportation service to SMEPA pursuant to a contract.

COMMENTS

The Concerned Coal Shippers have very serious concerns regarding recent application of the Board's SAC maximum rate constraint. Results of recent cases are widely viewed as casting serious doubt on the effectiveness of the Board's rate regulation activities to impose any meaningful constraint upon the railroads' pricing on captive coal traffic. The Concerned Coal Shippers urge the Board to exercise its maximum ratemaking jurisdiction in individual maximum rate cases in a manner that strikes a more effective balance between the interests of railroads and captive shippers.

I.

Background

The National Rail Transportation Policy set forth in 49 U.S.C. § 10101 requires, inter alia, that rates on captive traffic be maintained at reasonable levels and that regulatory intervention in commercial matters between railroads and shippers be minimized. ("In regulating the railroad industry, it is the policy of the United States Government-- (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail; (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required; . . . (6) to maintain reasonable rates where there is an absence of effective competition and where rail rates

provide revenues which exceed the amount necessary to maintain the rail system and to attract capital; . . . (12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination . . . .''). Id.

In adopting the Coal Rate Guidelines,[2] the Board's predecessor, the Interstate Commerce Commission ("Commission"), endeavored to ensure that its new methodology would, in application, provide a practical and effective means of challenging unreasonable rail rates. The operative element of the Guidelines, in all coal rate cases tried to date, has been SAC. The ICC's discussion of the SAC methodology in its Coal Rate Guidelines stressed the importance of avoiding concepts and practices that would prevent the SAC methodology from affording captive shippers meaningful protections. A good example of this is the treatment of grouping. The Commission viewed the ability of a shipper to group its traffic with the traffic of others as an essential element of shippers' cases, because without grouping, the SAC constraint simply would not allow shippers to develop and present an effective case before the agency. See Guidelines at 544 ("Without grouping, SAC would not be a very useful test, since the captive shipper would be deprived of the benefits of any inherent production economies."); id. at 549.

[2] Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987) ("Coal Rate Guidelines").

The significance of this emphasis upon the practical utility of the Guidelines should not be underestimated. The Commission knew full-well that its efforts to develop a methodology for assessing the reasonableness of maximum rates on captive traffic would be fruitless if shippers could not present meritorious cases for the Commission's consideration. As the Guidelines decision reflects, the Commission sought to devise a vehicle that would provide meaningful regulatory safeguards against monopoly pricing. The Commission also recognized that if such a vehicle for regulatory relief were available, it would greatly enhance the likelihood of negotiated commercial arrangements. Coal Rate Guidelines at 524 ("The benefit of these guidelines is to enable both the shipper and the railroad [during negotiations] to estimate the maximum rate we would prescribe if the matter were brought to us for adjudication. We believe that this will encourage contract solutions which (as shown below) may often be more efficient and more beneficial to both parties than a prescribed rate. For the same reason, we will be careful in applying these guidelines to avoid inhibiting or discouraging contract solutions.").

For several years after their promulgation, application of the Coal Rate Guidelines resulted in a moderate amount of litigation, with results sometimes favoring shippers and sometimes favoring carriers. It is fair to describe perceptions in the industry during that period as being that the agency's application of the Guidelines fostered commercial transactions, allowing parties to avoid litigation. Shippers and carriers

nearing the expiration of rail transportation agreements were able to develop some reasonable estimate of the level of rates that might be prescribed by the Commission if the parties were unable to consummate their contract negotiations successfully. Because both parties faced significant risk associated with such litigation, compromises and party-crafted resolutions were encouraged. As such, perhaps the greatest "achievement" of the Guidelines over the years can be seen in the number of instances in which a SAC complaint proved to be unnecessary, rather than in the number of instances in which litigation actually ensued.

In the last several years, however, there has been a marked shift in the course of coal rate litigation and resulting significant impacts on the transportation industry. Railroads have become far more aggressive in their pricing practices resulting in a significant increase in rate levels and rate cases. Largely due to the efforts of the railroads, SAC cases have become increasingly complex, protracted and expensive. This complexity has worked to the benefit of the carriers as the Board has become increasingly demanding in the nature and extent of evidence it requires of complaining shippers. In this environment, the outcome of SAC complaints has been decidedly less favorable to captive coal shippers. See Docket No. 42058, Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Ry. and Union Pacific R.R. (STB served March 15, 2005) ("AEPCO"); Docket No. 41185, Arizona Public Service Co. and PacifiCorp. v. The Burlington Northern and Santa Fe Ry. (STB served Dec. 13, 2004) ("APS"); Docket

No. 42069, Duke Energy Corp. v. Norfolk Southern Ry. (STB served Nov. 6, 2003, Feb. 3, 2004, and Oct. 20, 2004) ("Duke/NS"); Docket No. 42070, Duke Energy Corp. v. CSX Transportation, Inc. (STB served Feb. 4, 2004 and Oct. 20, 2004) ("Duke/CSXT"); Docket No. 42072, Carolina Power & Light Co. v. Norfolk Southern Ry. (STB served Dec. 23, 2003, and Oct. 20, 2004) ("CP&L"); West Texas Utilities Co. v. The Burlington Northern and Santa Fe Ry. (STB served May 29, 2003) ("WTU"); Docket No. 42056, Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry. (STB served March 24, 2003), and Sept. 27, 2004) ("TMPA"); Docket No. 42057, Public Service Co. of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Ry. (STB served June 8, 2004), and Jan. 19, 2005) ("Xcel"); Docket No. 42054, PPL Montana, LLC v. The Burlington Northern and Santa Fe Ry. (STB served Aug. 20, 2002, and Aug. 31, 2004). As the Board itself has commented, a number of these cases have involved rate increases over expiring contract rates on the order of fifty percent. Although a few of these cases, i.e., TMPA and Xcel, have resulted in findings that challenged rates exceed maximum reasonable levels, the relief afforded has been minimal.

The impact of the Board's decisions in these cases is that there is a widespread perception within the coal shipping community that a meaningful regulatory constraint on rail rates for captive coal traffic no longer exists. The shippers participating in these comments are very concerned about this situation, and they urge the Board to

assure balance in its future handling of maximum rate cases. It is only with proper regulatory balance that the competing statutory obligations of 49 U.S.C. § 10101 can be achieved.

II.

Identification of Specific Points of Concern

The following is a summary of five specific issues that deserve careful review and consideration by the Board as they arise in maximum rate cases under the SAC methodology, i.e., gaming, the indexing of operating costs, re-litigation of settled points, the burden of proof, and data availability. This list is not intended to be a comprehensive enumeration of all areas of the Board's SAC methodology or procedures that are of concern. Nor is the identification of these SAC-related issues intended to detract from the need for action by the Board to provide meaningful regulatory protections for captive shippers for whom the size and circumstances of their traffic renders the SAC methodology infeasible as a regulatory mechanism. Rather, the intent is to respond specifically to the Board's solicitation of comments concerning the application of the SAC methodology. In addition, the Concerned Coal Shippers wish to emphasize at the outset that they subscribe to the list of common principles submitted by the Subscribing Shippers. A copy of this list of principles is attached hereto as Exhibit No. 3.

A. Gaming

In several recent cases, complaining shippers have objected to the ability of a railroad to ensure a favorable result in a maximum rate case (i.e., to "game" the Board's ratemaking methodology) by the simple expedient of setting the rate(s) that it expects to be challenged at a very high level. The Board utilizes a "percentage reduction methodology" to determine how much rates that have been shown to be unreasonable under the SAC test should be reduced. The governing percentage is defined by the extent to which stand alone revenues exceed the stand alone costs. Because both the stand alone revenues and the stand alone costs are a function of the entire SARR traffic group, not just the issue traffic (which is usually a small percentage of the entire traffic group) – a railroad can game the analysis by setting challenged rates at extremely high levels so that even a sizable percentage reduction will leave it with very high rates. In short, the railroad can dictate the result of a rate case by its control of the starting point – i.e., the challenged rate.

This issue was raised for the first time in the three eastern cases (i.e., Duke/NS, Duke/CSXT, and CP&L), in which, as the Board acknowledged in its decisions, the challenged rates reflected increases over expiring contract rates that were on the order of fifty percent (50%). In its Decision served December 23, 2004 in CP&L, the Board acknowledged the significance of the gaming problem. The Board rejected several possible approaches to deal with this problem that were suggested by the shipper.

Of more significance, for present purposes, the Board declined to fashion its own solution:

> The parties have shown that the percent reduction method is susceptible to manipulation by parties: by a defendant railroad in setting a challenged rate at an artificially high level to limit the impact of a SARR over-recovery,[3] . . . That is sufficient to warrant a change; the maximum reasonable rate that can be charged to a complaining captive shipper should be determined by the Board, not by parties' litigation tactics.
>
> Accordingly, the Board is receptive to another approach for determining the appropriate extent of rate relief in SAC cases. Unfortunately, the Board has not been presented here with an alternative to the percent reduction approach that would remove the flaws while still conforming with the statute and Guidelines.

Id. at 31-32.[4]

The manner in which the gaming issue has been treated to date has effectively transformed the use of the percentage reduction methodology from an approach that would be used if and when appropriate, into a rigidly applied standard that permits no exceptions. Cf. Coal Rate Guidelines at 548 ("If we determine that a rate has

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[3] The Board also suggested the potential for gaming by a complaining shipper in the selection of its traffic group for the SARR. This suggestion seems untenable in light of the shipper's acknowledged right to select an optimal traffic group (see Guidelines, 1 I.C.C.2d at 542-44) and the fact that all elements of the shipper's traffic grouping must be supported by the shipper and are subject to challenge by the carrier, but the level of the railroad's challenged rate does not need to be justified, subject only to the SAC test.

[4] Although Duke Energy raised the subject of gaming in its two proceedings, the Board did not reach the issue in either case because of its finding that Duke had not demonstrated that the challenged rates were excessive.

been set at an unreasonably high level, we will take whatever action is appropriate, based upon the nature and extent of the violation shown, to afford relief to the complaining shipper and to promote proper pricing by the carrier.").

The key assumption that underlies the Board's percentage reduction methodology is that the current rate structure reflects the relative demand elasticities of the different movements in the SARR traffic group, and therefore should be preserved by the percentage reduction method. See Coal Trading Corp. v. The Baltimore and Ohio R.R., 6 I.C.C.2d 361, 380 (1990) (the percentage reduction methodology "preserves the rate structure for the traffic group by maintaining existing rate relationships, albeit at reduced levels, and thereby implicitly recognizes varying demand elasticities."); Arizona Pub. Serv. Co. v. The Atchison, Topeka and Santa Fe Ry., 2 S.T.B. 367, 392 (1997) ("This method assumes that the comparative rate levels of the various shippers in the group reflect their relative levels of demand elasticity, so that maintaining the existing rate structure implicitly preserves the carrier's demand-based differential pricing.").

However, existing rate levels do not reflect relative demand elasticities if the rates for the issue traffic bear no meaningful relationship to the rates for the other similar traffic in the traffic group.[5] The desirability of preserving the demand-based

[5] It is important to note in this context that use of the word "gaming" to describe the problem with the percentage reduction method should not be viewed as requiring a finding of subjective intent to manipulate the result. If the predicate for use of this approach is not satisfied, it should not be slavishly applied, regardless of a carrier's intent.

differential pricing reflected in the current rate structure is premised on an assumed market basis (i.e. similar mark-ups over cost in relation to similar demand characteristics) for all of the rates utilized in the percentage reduction analysis, including the rates applicable to the issue traffic. In CP&L this issue was presented, but it was not addressed by the Board in its decision. This is an essential issue that requires consideration in future SAC proceedings in which complainants allege gaming by the defendant carrier.

Thus far, the Board's posture on the gaming issue has been that it is willing to consider alternatives to percent reduction, but is unwilling to develop its own solution to neutralize the possibility of railroad gaming.

> . . . The Board welcomes proposals for appropriate alternatives to the percent reduction approach in future cases. But in the absence of a feasible alternative that satisfactorily addresses the concerns articulated here and conforms with the statute, the Board will not depart from its precedent.

CP&L at 33; accord Xcel at 38. Shippers have attempted and are continuing to attempt to advance proposals in individual rate cases that are appropriate to counter the gaming problem. However, even if it finds such proposals inappropriate, for whatever reasons, this is certainly the type of issue that the Board can address by modifying shipper proposals as necessary to render them appropriate or otherwise formulating its own solution. Simply rejecting shippers' efforts until the "right" proposal is advanced seems plainly inconsistent with the Board's duty to refrain from merely "calling balls and strikes" and to act affirmatively to provide the shipping public the benefit of meaningful

regulatory oversight. See, e.g., Aberdeen and Rockfish R.R. v. United States, 270 F. Supp. 695, 711 (E.D. La. 1967) ("In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.").

The Board itself has recently affirmed that its role is fundamentally different from that of a court, and that it has an affirmative obligation to protect captive shippers from defendants' litigation strategy. Specifically, in Xcel, the Board stated that it "must not permit a defendant railroad's litigation strategy to make meaningful regulatory review impossible." Xcel at 22. The Board added that "rail rate cases are not ordinary commercial litigation, given the nature of rail rates charged to captive shippers" and that "[i]n this regard, the Board's role differs from that of a court." Id. at 22-23 (citing AEPCO (STB served Nov. 19, 2003), at 2). Moreover, the Board acknowledged that it "is not simply an adjudicator; rather, it is charged with carrying out the rail transportation policy set forth in 49 U.S.C. 10101, and more specifically with investigating the reasonableness of a challenged rate, making findings as to its reasonableness, and then taking appropriate action to compel compliance with the statute." Xcel at 23.

The gaming issue is implicated in SAC cases currently pending before the Board, and presumably will also arise in any future SAC cases that may arise before the

Board comes to grip with the issue. Captive Coal Shippers urge the Board to address this extremely important issue in such individual cases, rather than through a rulemaking process, for reasons discussed in a later section of these comments.

B. Cost Indexing

The Board's current approach to indexing stand-alone costs dooms each complaining shipper's SARR to constantly deteriorating financial performance, with stand-alone costs escalating at a much steeper rate than stand-alone revenues. In particular, the Board has adopted a procedure for forecasting revenues over the 20-year DCF period using an EIA index that reflects the impact of productivity. See, e.g., TMPA at 29. For forecasting operating costs, however, the Board has, in recent cases, relied upon the RCAF-U index, which does not consider productivity. In combination, these approaches require the irrational assumption that although a SARR's operating costs will not be reduced by productivity improvements, the SARR will reduce its rates as though operating costs were so reduced. Obviously, these twin assumptions condemn a SARR to continually diminishing profit margins in a manner that would not occur in the real world.

In its 2001 decision in Docket No. 42051, Wisconsin Power & Light Co. v. Union Pacific R.R. (STB served Sept. 12, 2001) the Board applied a methodology for indexing operating expenses that reflected the impact of productivity. The Board there explained that "[i]t is not unreasonable to expect that an efficient railroad built today

would realize future productivity gains by utilizing new technology as it develops." Id. at 106.

In recent SAC cases, however, the Board has rejected use of the productivity- adjusted RCAF-A to index operating expenses, on grounds that a new least-cost, most-efficient SARR could not be expected to experience productivity gains akin to what actual railroads achieve. See, e.g., TMPA at 161; Xcel at 33-34; CP&L at 27; Duke/NS at 37; Duke/CSXT at 30. Recognizing that certain types of productivity gains would clearly be achieved by the SARR, the Board nevertheless has rejected several different approaches proposed by shippers in individual cases on grounds that it has not been convinced they would be sufficiently accurate. See Xcel at 33-34; CP&L at 27-28; Duke/CSXT at 30.

The Board's recent decisions refusing to recognize productivity improvements when indexing operating expenses are difficult to understand from an economic perspective. First, as the Board has acknowledged, SARR's will definitely experience productivity improvements, which the RCAF-U will not reflect. Second, the Board's logic that "the potential impact of [productivity] improvements [for a SARR] is far less than it would be for existing railroads, which make changes incrementally as older technology assets wear out or become obsolete" (CP&L at 27) fails to take into account its own rulings on other issues in SAC cases. Specifically, the Board's decisions routinely adopt the SARR operating plans and operating assumptions of the carriers,

which obviously have every incentive to make the operations as costly as possible. There are numerous respects in which such SARR operations are very inefficient and could be significantly improved, as complaining shippers have demonstrated, but to no effect. In short, in many respects, the SARRs resulting from the Board's recent decisions are not least-cost, most-efficient operations, but are more like vastly less efficient versions of the existing railroads. Obviously, a SARR starting off with such inefficient operations has the opportunity for major productivity improvements.

The recent treatment of operating cost indexing in SAC cases is inconsistent with the National Rail Transportation Policy, which obligates the Board to promote: "fair and expeditious regulatory decisions," the maintenance of "reasonable rates where there is a lack of effective competition," and the use of "accurate cost information in regulatory proceedings." 49 U.S.C. § 10101(2), (6) and (13). The Board's affirmative regulatory duty is such that it "is not the prisoner of the parties submissions," but rather must "weigh alternatives and make its choice according to its judgment how best to achieve and advance the goals of the National Transportation Policy." Baltimore & Ohio R.R. v. United States, 386 U.S. 372, 429-30 (1967) (Brennan, J., concurring).

In this regard, the Board has been entirely free to adopt some solution to the cost indexing problem that goes beyond the specific submissions made by the parties. The Board is an expert agency with extensive knowledge about and frequent exposure to such issues. Nevertheless, the Board has declined to develop such a solution, instead

repeatedly deferring to the railroads' evidence despite acknowledging that this approach underestimates the productivity enhancements that a SARR would experience and thus overstates operating costs.

C. "No Relitigation" Policy

By its decision served March 21, 2001, the Board told parties to SAC cases to desist from their efforts to relitigate settled SAC issues. Ex Parte No. 347 (Sub-No. 3), General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases (STB served March 21, 2001), at 6. Specifically, the Board stated that "parties to SAC cases are cautioned not to attempt to relitigate issues that have been resolved in prior cases." Id. In conjunction with this announcement of policy, the Board identified three prior cases in which it addressed "settled" issues, including:

> Arizona Pub. Serv. Co. v. Atchison T. & S.F. Ry., 2 S.T.B. 367, 385-387 (1997) (rejecting barrier-to-entry arguments resolved in prior case); McCarty Farms, 2 S.T.B. at 484 (reaffirming "unconstrained resource assumption" accepted in prior cases); FMC, slip op. at 74-77 (rejecting the weighted system average cost (WSAC) procedure for developing maintenance-of-way (MOW) expense in favor of the speed factor gross ton (SFGT) approach because WSAC has not been shown to be an appropriate tool for developing MOW costs for freight traffic).

Id. at 6 n.22.

Rather than enforce that policy, however, the Board instead has rewarded defendant railroads who have sought to relitigate precisely this type of settled issue. For

example, in TMPA, the Board accepted BNSF's argument that the Speed Factor Gross Ton approach should be abandoned despite the fact that this very issue appeared as an example of "settled" issues in the Board's 2001 Ex Parte No. 347 (Sub-No. 3) decision.

The Board's failure to adhere to a consistent position as to the precedential effect of its decisions is significant because there are a number of issues as to which captive shippers believe that the Board's "settled" approach does not reflect the proper result. Generally, however, complaining shippers have avoided re-litigating each of those issues in individual cases, and instead, have accepted the Board's admonition. Unfortunately, however, the railroads have not abided by the Board's instructions and have benefited as a result.

One example of note pertains to the division of revenues on cross-over SARR traffic. Some or much of the traffic handled by a SARR may be traffic which the defendant railroad handles in the real world, but which the SARR handles jointly with the defendant railroad in the SAC world. This requires that the real world revenues for this traffic be divided between the SARR and the defendant railroad as part of the SAC analysis. This has been a contentious issue in individual cases. See, e.g., AEPCO, AEP Texas, Duke/NS, Duke/CSXT, CP&L. The Board established a new methodology for establishing divisions of cross-over traffic revenues in coal rate cases decided in 2003 and 2004. See Duke/NS, at 24 (adopting the Modified Straight-Mileage Prorate methodology for revenue divisions on cross-over traffic).

D. Burden of Proof

SAC analysis is a very complicated process and the railroads have been very successful in making it more so with each passing case. At the same time that the number of issues has proliferated and the amount of evidence required to address the issues has grown, the Board has become increasingly demanding in terms of the nature, extent and timing of the evidence required for a shipper to satisfy the burden of proof it bears as a complainant. This problem has been compounded by the fact that the Board frequently has rejected a shipper's evidence only to accept railroad evidence that contains major flaws that had been pointed out by the shipper. In short, the process has not been conducive to development of findings based upon the best evidence of record, which might often be a blend of the shipper's and railroad's evidence, or a corrected/modified version of either, but rather has set a very high bar for shipper's evidence, and, when that bar is not deemed met, a very low or no bar for the railroad's evidence.

This approach is fundamentally inconsistent with the Board's statutory duty and its own Coal Rate Guidelines. As the Commission stated in Coal Rate Guidelines "The purpose of a SAC analysis is to determine the least cost at which an efficient competitor could provide the service . . ." 1 I.C.C.2d at 542 (emphasis in original). Recent Board decisions have demonstrated little interest in fulfilling that purpose. As the entity charged with responsibility to protect captive shippers from market dominant railroads, the Board has an affirmative duty to attempt to ensure that its decisions in SAC

cases are based upon a "least-cost, most-efficient" SARR model. This is not to suggest that complaining shippers should not bear the burden of proof. However, consistent with the best findings it is able to make based upon all the evidence presented, the Board should base its findings on the most efficient, least cost SARR possible. "[A]lthough many different SAC calculations could be offered, we will be guided in individual cases by the least cost (theoretically) feasible SAC model" Coal Rate Guidelines, 1 I.C.C.2d at 542.

E. Availability of Data

While the Board imposes very strict proof burdens on shippers, in most instances the data needed in a SAC case to meet those burdens is in the exclusive possession and control of the railroads. The Coal Rate Guidelines explicitly recognize that shippers require "substantial" discovery to litigate a case under Constrained Market Pricing. Coal Rate Guidelines, 1 I.C.C.2d at 548. In actual practice, however, railroad defendants have effectively managed the discovery process to deprive shippers of access to much of the relevant data until very late in the discovery process (not infrequently after the formal close of discovery).

In SAC cases, although shippers serve their discovery requests very soon after filing their complaints, the formal "close" of discovery that appears in the Board's standard procedural schedule has become a typical date for the production of meaningful railroad document production, with certain production being made significantly later. In

fact, it is not uncommon for the substantial completion of railroad document production to occur at a point in time that is closer to the due date for opening evidence than to the formal close of discovery. The timing of the railroads' production is critical, however, because a complaining shipper depends upon railroad documents (principally the traffic tape data that all parties acknowledge to be relevant and necessary) to develop its SARR traffic group. Nearly all other facets of a shipper's opening stand-alone presentation must wait until the production – and requisite analysis – of the traffic tape data. In situations in which that data proves to be incomplete or defective (thus requiring the inevitable follow-up inquiries between counsel), further delay and complication arises.

Further adding to the burden experienced by complaining shippers is the fact that railroad defendants frequently require shippers to travel to remote locations in order to review certain documents, rather than agreeing to produce documents to the offices of the shippers' representatives. This approach to production necessarily adds delay as document review schedules are coordinated and as actual physical production is subsequently accomplished. In addition, railroads frequently request that shippers narrow their requests for certain documents (e.g., a subset of the railroad's locomotive leases) that the shipper can only develop based upon its review of other railroad document production.

The railroads' standard delay in the production of documents thus places extraordinary burdens upon complaining shippers who are forced to choose between

delaying their cases (while paying extremely high rates) or proceeding with less than complete information from the railroads. In addition, shippers frequently are confronted with the argument that their cases are not sufficiently supported by real-world data or that their evidentiary presentations are not adequately formatted (e.g., proper linking of electronic spreadsheets). Since the delay in production of critical documents gives rise to, or exacerbates, each of these difficulties, ensuring that railroad defendants complete their document productions in a prompt and thorough manner is very important to the efficient processing of SAC cases. So to is preclusion of the use of information by railroads in their reply submissions that is responsive to shipper's discovery requests, but that was not produced in discovery.

III.

A New Rulemaking Would be Inappropriate

Despite their concerns with the Board's recent decisions, the Concerned Coal Shippers respectfully submit that a rulemaking would be the wrong vehicle through which to evaluate and implement solutions to these problems. The subject problems arose in the course of the Board's adjudication of individual maximum rate cases, and the Board should use the same, case-by-case approach to solve these problems.

In the Guidelines, the ICC said that it would deal with the application of the SAC methodology on a case-by-case basis. Coal Rate Guidelines at 525 ("We also consider the guidelines to be a workable approach to the case-by-case resolution of rate

complaints in market dominant situations."). Other ICC/STB decisions include the same commitment. See, e.g., Docket No. 42057, Public Service Co. of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Ry. (STB served June 8, 2004), at 36 ("The Guidelines do not set forth a specific method for determining rate prescriptions and reparations, leaving the inquiry to a case-by-case analysis."); Docket No. 41989, Potomac Electric Power Co. v. CSX Transp., Inc. (STB served Nov. 24, 1997), at 3 (the standards for proper SAC rebuttal evidence must be evaluated on a case-by-case basis).

Perhaps most directly relevant are the Board's statements in its November 27, 2001 combined decision in the PPL Montana, TMPA, Xcel, and AEPCO cases that it would be inappropriate to conduct some form of generalized inquiry into common SAC issues, and continuing its policy of resolving issues in the course of individual cases:

> BNSF/UP contend that, even though a wide range of complex and theoretical issues relating to the application of the SAC test have been resolved through individual adjudications since 1985, we should now depart from our case-by-case approach and separately address in general terms several selected issues that have arisen in recently decided or pending cases. The railroads assert that, while they and their shippers are now able to gauge how we will resolve most issues relating to the cost of constructing and operating a stand-alone railroad, it is more difficult for parties to predict how we will resolve issues relating to the revenues that can be assigned to the hypothetical railroad. This uncertainty, the carriers argue, lessens the chances that parties can reach negotiated solutions and thus increases the likelihood of litigation over rail rate levels.

> To reduce the asserted uncertainty surrounding application of the SAC test, the carriers request that we obtain comments from all interested parties on several broad issues implicated in recent or pending rate complaint cases. First, the railroads contend that the long-term traffic forecasts required by multi-year SAC analyses are inherently unreliable and they suggest that we consider using a one-year SAC analysis instead. Second, the railroads charge that certain shipper SAC presentations have included in the traffic group non-issue traffic that improperly subsidizes the issue traffic. This cross-subsidization occurs, the railroads assert, when the revenues that it is assumed the SARR would receive for handling traffic hypothetically interchanged with the defendant railroad (so-called cross-over traffic) is overstated or when the revenues from non-issue traffic are used to cover the costs of facilities (required by the issue traffic) that the non-issue traffic would not use. The carriers suggest that we develop procedures for identifying and removing such cross-subsidies. Finally, UP and BNSF assert that a hypothetical railroad would require a more accelerated recovery of investment than recognized by our prior decisions, and the railroads ask that we reconsider the propriety of applying a real options adjustment in SAC cases to meet that objective.
>
> We have carefully considered whether the processing of pending and future cases would be aided by breaking out and separately examining some or all of the issues identified by the railroads in a general rulemaking-type proceeding. While the railroads have raised significant issues, some of which are not yet fully resolved, about how we should apply SAC in our maximum rate reasonableness adjudications, we conclude that it is preferable to continue our general policy of addressing these types of issues as they arise in individual adjudications.

Docket Nos. 42054 et al., PPL Montana v. The Burlington Northern and Santa Fe Ry. (STB served Nov. 27, 2001), at 4-5 (emphasis added).

It should be noted that the very nature of SAC cases calls for dealing with important issues in the setting of individual cases. Complaining shippers are intended to have broad flexibility to develop and present the SARR traffic group, operating plan, physical plant, etc. that they believe will offer the least cost SARR option. The resolution to a given issue that makes the most sense to an individual shipper in the context of all the facts and circumstances of its case may not be the best solution for another captive shipper in differing circumstances.

If the Board were to contradict its own precedent and initiate a rulemaking, it would place significant burdens upon shippers to engage in what may well amount to years of administrative deliberations. Moreover, a rulemaking proceeding might well hinder the progress of SAC cases currently pending before the Board and any others filed during the pendency of such a rulemaking, as the ICC's experience with the development and implementation of the Coal Rate Guidelines suggests. Accordingly, the Concerned Coal Shippers strongly urge the Board to refrain from engaging in one or more rulemaking proceedings, but instead, request that the Board resolve existing issues in pending and future rate cases in a manner that affords captive shippers a reasonable opportunity to obtain meaningful rate relief. See American Telephone and Telegraph Co. v. FCC, 978 F.2d 727 (D.C. Cir. 1992) ("Agencies do have a fundamental choice whether to interpret and apply federal statutes through adjudication or through rulemaking. But they cannot avoid their responsibilities in an adjudication properly before them by looking

to a rulemaking . . . .") (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988)).

CONCLUSION

The Concerned Coal Shippers respectfully submit that major problems exist with the Board's SAC methodology as applied in recent coal rate cases. These problems need to be addressed and resolved in a manner that permits captive shippers to obtain meaningful protection from unreasonable rates.

For the reasons discussed above, the best manner in which to address such problems is to engage them and resolve them in individual rate cases.

Respectfully submitted,

CONCERNED CAPTIVE
COAL SHIPPERS

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Dated: April 20, 2005

BEFORE THE
SURFACE TRANSPORTATION BOARD

RAIL RATE CHALLENGES UNDER THE STAND-ALONE COST METHODOLOGY	)))))	Ex Parte No. 657

WRITTEN TESTIMONY FOR ORAL HEARING
OF S.M. DeBORD
AMERICAN ELECTRIC POWER SERVICE CORPORATION

My name is Michael DeBord, and I am the Vice President, Transportation & Combustion Services of American Electric Power Service Corporation ("AEPSC"). AEPSC acts as an agent to secure the rail transportation services required by a number of affiliated American Electric Power ("AEP") companies.

Background

AEP, with more than 5 million American customers, is one of the country's largest investor-owned utilities, serving parts of 11 states. The service territory covers 197,500 square miles in Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia and West Virginia.

AEP owns and operates about 80 generating stations in the United States, with a capacity of more than 36,000 megawatts. Coal-fired plants account for 73 percent of AEP's generating capacity. AEPSC secures coal transportation services for more than 35 million tons of AEP's coal supply annually, at a total cost of more than $350 million.

One AEP electric generating company, AEP Texas North Company, is the complainant in Docket No. 41191 (Sub-No. 1), which is currently pending before the Board. Therein, AEP Texas North is challenging BNSF Railway Company's rates for service to the Oklaunion Station in Vernon, Texas.

Statement of Position

The vast majority of AEP's coal-fired generating stations enjoy some form of competition in terms of coal transportation service. As a result, we are not a traditional "captive" shipper with respect to the vast majority of our traffic. In those situations in which our plants are captive, however, we are very exposed to the revenue demands of our market dominant rail carriers notwithstanding the size and scope of our operations. Like all other captive coal shippers, we need an effective ratemaking methodology to be in place at the STB to protect against unreasonably high rate levels.

The existence of a firm right of recourse at the STB permits captive shippers to engage in meaningful negotiations with rail carriers regarding commercial arrangements for the transportation of coal. Where the rate regulation process is viewed as ineffective, though, or where parties are no longer able to evaluate with any reasonable degree of reliability the rates that application of the Board's ratemaking methodology would produce in a given situation, shippers and rail carriers are placed in a difficult position in which each side lacks a reasonable benchmark to guide its actions and to evaluate proposals or demands made by the other party.

As the Board is aware, AEP Texas North Company is currently involved in a SAC case before the Board regarding our Oklaunion Station near Vernon, Texas. From our perspective as a complainant, we have found the SAC process to be very complex, very time-consuming, and very expensive. Also, as we have followed the results in other SAC cases that have been decided while our case has been pending, we have grown increasingly concerned about our situation. As a litigant in an individual case, we would hope that the Board would decide -- in our individual case -- each one of the issues that has been presented by the parties, rather than to defer consideration of those issues to some form of generalized rulemaking proceeding. Having shouldered the burden of litigating a SAC case to this point in time, we believe that we should not be forced to bear the additional expense of an entirely new proceeding in which we would be required to re-present each of our arguments regarding the most significant SAC issues. Such a proceeding could take months if not years to complete, and we fear it could deprive us of a timely ruling upon our complaint.

BEFORE THE
SURFACE TRANSPORTATION BOARD

RAIL RATE CHALLENGES UNDER THE STAND-ALONE COST METHODOLOGY	)))))	Ex Parte No. 657

WRITTEN TESTIMONY FOR ORAL HEARING
OF JASON FRISBIE
PLATTE RIVER POWER AUTHORITY

My name is Jason Frisbie, and I am the Division Manager, Power Production of Platte River Power Authority. The purpose of my statement is to provide the Board with Platte River's view of the importance of meaningful rate regulation as a backdrop to successful commercial arrangements between coal shippers and their rail transportation providers.

Background

Platte River Power Authority is a political subdivision and public corporation of the State of Colorado which supplies the electricity used by the communities of Estes Park, Fort Collins, Longmont, and Loveland, Colorado. Its headquarters is located in Fort Collins, and it has facilities located primarily along the Front Range and the western slope of northern Colorado, in addition to a wind project at Medicine Bow, Wyoming. Platte River also provides surplus electricity and related ancillary services to other utilities in the western United States.

Platte River owns and operates the Rawhide Energy Station, which is a 270 MW (net) coal-fired power plant, located north of Fort Collins, along with related transmission lines in northern Colorado. Platte River also has an 18% (154 MW) interest in the Yampa Project, consisting of Craig Stations Units 1 and 2, a coal-fired plant located near the town of Craig approximately 130 miles west of Fort Collins on the western slope of Colorado. The Yampa Project is adjacent to the Trapper Mine which is the primary coal supplier for the plant and is jointly-owned by the participants.

The total annual coal consumption at Rawhide is approximately 1.3 million tons. BNSF Railway Company ("BNSF") provides the only rail service option for coal moving to the Rawhide Station, and currently provides such service pursuant to contract.

I am responsible for operations at the Rawhide Station including the rail transportation of our coal requirements. As a result, I have been a principal negotiator in the commercial negotiations through which Platte River has secured its coal transportation services.

Statement of Position

I would like to emphasize at the outset that Platte River is not appearing today to raise any form of complaint regarding BNSF. We have a contract with BNSF for rail transportation of our coal, and we are pleased to have BNSF as our service provider.

At the same time, Platte River is very much aware of its status as a captive shipper. In our experience, the existence of effective rate regulation at the Board has

been an important factor contributing to our success in negotiating contractual service arrangements, which we have been able to do on multiple occasions.

Although we are currently under contract, that contract will expire at the end of 2007 and Platte River will need to make new arrangements for our coal transportation requirements. In this context, we are concerned about the situation that currently exists in regard to the perception in the industry of the lack of any meaningful rate regulation by the Board over captive coal rates. In light of this situation, we urge the Board to do everything reasonably possible to improve the current situation.

While we believe that the Board needs to take action to improve its regulation of rates on captive traffic, we do not support the idea of a rulemaking proceeding regarding SAC issues. Such a proceeding would require a significant expenditure of money by coal shippers, and could make what we regard as an unfavorable situation even worse. Our preference is that the Board address problems with its SAC methodology in individual rate cases as it has in the past.

Platte River sincerely hopes never to be involved in a SAC proceeding before this Board. We believe that the best way for us to avoid such a case and the best way to continue to facilitate commercial arrangements that are in the best interests of both Platte River and BNSF would be for the Board to apply its *Coal Rate Guidelines* in pending and future SAC cases in a balanced and consistent manner. With the assurance of the availability of meaningful rate relief at the Board, negotiated resolutions will be far

more likely to be achieved, and the amount of coal rate litigation before this Board should be much less.

BEFORE THE
SURFACE TRANSPORTATION BOARD

RAIL RATE CHALLENGES UNDER THE STAND-ALONE COST METHODOLOGY	)	**Ex Parte No. 657**

JOINT STATEMENT BY

ALLIANCE FOR RAIL COMPETITION
AMERICAN PUBLIC POWER ASSOCIATION
COLORADO WHEAT ADMINISTRATIVE COMMITTEE
CONCERNED CAPTIVE COAL SHIPPERS
CONSUMERS UNITED FOR RAIL EQUITY
EDISON ELECTRIC INSTITUTE
IDAHO BARLEY COMMISSION
IDAHO WHEAT COMMISSION
MONTANA WHEAT & BARLEY COMMITTEE
NATIONAL ASSOCIATION OF WHEAT GROWERS
NATIONAL BARLEY GROWERS ASSOCIATION
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
OKLAHOMA WHEAT COMMISSION
SOUTH DAKOTA WHEAT COMMISSION
TEXAS WHEAT COMMISSION
WASHINGTON WHEAT COMMISSION
WESTERN COAL TRAFFIC LEAGUE

Alliance for Rail Competition, American Public Power Association, Colorado Wheat Administrative Committee, Concerned Captive Coal Shippers, Consumers United for Rail Equity, Edison Electric Institute, Idaho Barley Commission, Idaho Wheat Commission, Montana Wheat & Barley Committee, National Association of

Wheat Growers, National Barley Growers Association, National Rural Electric Cooperative Association, Oklahoma Wheat Commission, South Dakota Wheat Commission, Texas Wheat Commission, Washington Wheat Commission, and Western Coal Traffic League (collectively "Subscribing Shippers") hereby submit the appended Subscribing Shippers' Joint Statement of Principles in this proceeding. Many of the Subscribing Shippers will be separately submitting individual statements.

Respectfully submitted,

Alliance for Rail Competition
American Public Power Association
Colorado Wheat Administrative Committee
Concerned Captive Coal Shippers
Consumers United for Rail Equity
Edison Electric Institute
Idaho Barley Commission
Idaho Wheat Commission
Montana Wheat & Barley Committee
National Association of Wheat Growers
National Barley Growers Association
National Rural Electric Cooperative Association
Oklahoma Wheat Commission
South Dakota Wheat Commission
Texas Wheat Commission
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Counsel for Concerned Captive Coal Shippers

Dated: April 20, 2005

EXHIBIT

SUBSCRIBING SHIPPERS' JOINT STATEMENT OF PRINCIPLES

- The decisions in recent SAC cases have been uniformly unfavorable to captive shippers. These decisions have resulted in the transfer of hundreds of millions of dollars in rate increases from railroad customers and the public to four (4) dominant coal-carrying railroads.

- As a direct result of the Board's recent decisions, many captive shippers are paying considerably higher rates and charges than had been in place as little as three years ago. The burdens associated with these rate increases have been compounded by poor service, thus exacerbating the harm experienced by captive shippers and their customers.

- Railroad managements have interpreted these recent STB decisions as a "green light" for even greater increases in rail rates and charges, with the net effect that the bargaining power between railroads and their customers has become significantly biased towards the railroads. The railroads have been so emboldened that many captive shippers have now been forced into a new era of "take-it-or-leave-it" negotiations, in which carriers even have refused to enter into contracts.

- Although the Board properly has stated that it is not the "umpire, blandly calling balls and strikes" when adjudicating rate cases, and that "the right of the public must receive active and affirmative protection at the hands of the [Board]," these principles have been applied inconsistently in recent decisions and there is little evidence of meaningful protection.

- The Board has recognized that major case-specific problems exist in its current approach to SAC and these problems are leading to skewed results. The failure to resolve such problems in individual cases -- the context in which they arose -- threatens to deprive captive shippers for which a SAC case is even theoretically possible of any meaningful regulatory review.

- In a related context, small and non-coal captive shippers currently are experiencing particular harm. STB Chairman Nober testified before Congress that "[I]f no small cases are brought, this means that in practice, only about 75 coal shippers have a meaningful opportunity to challenge rail rates. This is unacceptable." Yet the Board has not offered any meaningful solution to the particularly acute difficulties faced by the 99%+ of captive shippers in the nation that cannot bring cases under the SAC constraint.

- The statutory requirement that captive shippers' rail rates must be "reasonable" needs to be implemented in a manner that ensures that captive rail shippers of all sizes and in all locations are protected by effective remedies to limit monopoly pricing by market dominant railroads. This includes non-coal shippers who have no tested or approved methodology for rate relief.

- If private-sector solutions are to be preferred, there must be more effective rail-to-rail competition. Private-sector solutions equate to a free hand for monopoly railroads where there is neither effective competition nor effective regulation.

- Using notice-and-comment proceedings to consider issues of SAC implementation which arose in individual SAC cases serves the railroads' interests in making rate cases even more difficult and expensive. The SAC problems which have arisen by Board action or inaction in individual cases should be resolved by Board remedial actions in individual cases.

- The Board is urged not to use rulemaking or other notice-and-comment procedures to address issues of SAC implementation, for four interrelated reasons:

  • First, the Coal Rate Guidelines clearly provide that complex SAC issues are best left to case-by-case resolution.[1] See Guidelines at 542-43 (SAC computations are "left to the parties to make in each case"). See also PPL Montana, et al. at 5 (Board denied request by BNSF and UP to institute separate proceedings, citing the policy of addressing SAC issues "as they arise in individual adjudications.")[2]

  • Second, the SAC standards themselves are not hard-and-fast "rules." See OPPD at 142 (the Guidelines "are styled guidelines precisely because they do not contain rules").[3] The STB does not need to initiate rulemakings to change guidelines that are not rules. All SAC implementation issues can – and should – be addressed in individual cases.

  • Third, side-bar proceedings will divert the Board's attention from correcting case-specific SAC implementation issues where they should be corrected – in pending coal rate cases. Many coal rate cases were left in limbo for years as the ICC struggled to develop the Guidelines. Reopening the Guidelines for rulemaking proceedings raises the specter of similar delays and added expense, as coal shipper-complainants get caught in the cross-fire between their cases and the generic rulemaking proceedings.

  • Fourth, any SAC-related rulemaking proceedings paralleling pending complaint cases are likely to be complex, time-consuming and expensive. If past is prologue, any STB decisions are likely to be appealed, resulting in further delays and uncertainty.[4] It took the Board's predecessor, the ICC, almost a decade to promulgate the Coal Rate Guidelines, and the appeals took another two years. Shippers have no assurance that any new "rulemaking" proceedings concerning the Guidelines will be on a faster track or produce meaningful results.

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[1] See Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d 520 (1985) ("Coal Rate Guidelines" or "Guidelines"), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3rd Cir. 1987).

[2] PPL Montana, LLC v. Burlington Northern and Santa Fe Ry., STB Docket No. 42054, et al. (STB served Nov. 27, 2001).

[3] Omaha Public Power District v. Burlington Northern R.R., 3 I.C.C. 2d 123 (1986).

[4] See, e.g., Ass'n of Am. R.Rs. v. STB, 146 F.3d 942 (D.C. Cir. 1998) (denying as unripe the AAR's challenge to the STB's small rate case standards).